Nos. 73-152 and 73-153

IN THE

Supreme Court of the United States

October Term, 1973

BANGOR PUNTA CORPORATION, NICOLAS M. SALGO, DAVID W. WALLACE AND THE FIRST BOSTON CORPORATION,

Petitioners,

v.

CHRIS-CRAFT INDUSTRIES, INC.,

Respondent.

On Petitions for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' JOINT REPLY BRIEF

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September 25, 1973

IN THE

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PETITIONERS' JOINT REPLY BRIEF

This brief is submitted jointly by petitioners Bangor Punta Corporation ("Bangor Punta"), Nicolas M. Salgo, David W. Wallace and The First Boston Corporation ("First Boston") in reply to the Brief for Respondent in Opposition submitted herein by Chris-Craft Industries, Inc. ("Chris-Craft") on September 18, 1973.*

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* Howard Piper, Thomas C. Piper and William T. Piper, Jr. (the "Piper defendants"), petitioners in No. 73-154, intend to file a separate reply to the Chris-Craft brief.

POINT I

The trial court's findings of fact negate any claim that any of the defendants engaged in fraudulent conduct.

Chris-Craft's characterization of this action as "a 'garden variety' case of stock fraud" inappropriate for review by this Court (Chris-Craft Brief, p. 15) constitutes the most severe mischaracterization of the record below. A case which gives rise to 250 pages of opinions representing the differing views of 13 federal judges, and in which liability is found in the first instance at the appellate level, rather than by the trial court—on the basis of legal standards on the formulation of which no two judges agreed —is hardly commonplace.

No fraud of the "garden variety" or any other variety was practiced by any of the defendants herein. Honorable Milton Pollack, U.S.D.J., a trial judge of wide experience, who heard the witnesses and evaluated all of the evidence presented at trial, found as fact that none of the defendants engaged in any fraudulent conduct at any time.

With respect to the conduct of the Piper defendants, the trial court wholly rejected Chris-Craft's claims of "bad faith and intention to mislead." (Jt. App. G-11-12)

The Bangor Punta defendants were similarly found to have acted at all times in complete good faith with no fraudulent intent. Although holding that Bangor Punta's prospectus for its Piper exchange offer was misleading because of the "unique 'valuation' nature" of the carrying value of the BAR (Jt. App. C-15-16), the trial court characterized the prospectus as being "unintentionally in error" (Jt. App. G-19) and expressly rejected any claim of fraud. (Jt. App. C-14)

With respect to Bangor Punta's cash purchases of Piper shares in May, 1969, the trial court concluded that while the purchases were in "technical violation" of Rule 10b-6, there was "not a scintilla of evidence" of any fraud (Jt. App.

G-27) and found as a fact that these transactions "while they did not comply with the literal terms of the exemption contained in paragraph (a)(3)(2) of Rule 10b-6, were nevertheless well within the spirit of the exemption."* (Jt. App. G-26-27)

Lastly, with respect to First Boston, the trial court found as a fact that it acted in complete good faith and had not "engaged in any course of conduct which operated as fraud or deceit upon Chris-Craft or the public shareholders of Piper." (Jt. App. G-34)

Thus the trial court's findings of fact, which were expressly adopted by the Second Circuit (Jt. App. H-37), negate any claim that this is "a 'garden variety' case of stock fraud."

To bolster its characterization of this action, Chris-Craft asserts as fact matters which are unsupported and, indeed, unsupportable by any citations to the record or the findings of the District Court. For example, Chris-Craft's references to such things as a "plot" on the part of the defendants (Chris-Craft Brief, p. 6), to Bangor Punta's counsel's "forsaking his own advice" concerning Rule 10b-6 (Chris-Craft Brief, p. 9) and to First Boston's supposed admission of guilty knowledge (Chris-Craft Brief, p. 33) are wholly at variance with the facts, the record and the findings of the District Court. The Court is respectfully referred to the findings and opinions of the District Court, which categorically reject any claim of wilful misconduct on the part of any of the defendants.

As discussed more fully in the petitions for certiorari filed herein, the legal standards which the Second Circuit applied wholly eliminate the need for any proof of *scienter*

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* The assertion by Chris-Craft that the Rule 10b-6 violation renders review of the rulings on Section 14(e) unnecessary (Chris-Craft Brief, pp. 20-22) is plainly untenable, for four of the seven petitioners were not involved in any way in the transactions which were found to be technical violations of Rule 10b-6. The claims against them are predicated solely on Section 14(e) of the 1934 Act.

or causation under the 1934 Act and in the process utterly destroy the overall pattern of regulation of the Securities Laws by eliminating all the limitations on the liability of directors, officers, underwriters and experts contained in the 1933 Act. Such a far-reaching decision compels review by this Court.

POINT II

Review by the Court at this time is both appropriate and desirable.

Chris-Craft asserts that review on certiorari is inappropriate at this time because the case has been remanded to the District Court for assessment of damages and entry of injunctive relief in accordance with the decision of the Second Circuit. However, review at this time is not only appropriate* but is in the interests of both the legal and business communities and the parties to this action.

As discussed more fully in the petitions for certiorari filed herein, the ramifications of the legal standards applied by the Second Circuit in this action extend far beyond the instant case, affecting numerous securities cases now pending in the federal courts. It is therefore imperative that review of these standards by the Court occur at the earliest possible opportunity.

Moreover, review on certiorari at this time could greatly expedite the ultimate resolution of this case. If this Court were to determine that the decision of the Second Circuit should be modified or, as petitioners urge, reversed in its entirety, the interests of judicial economy and of all the parties are best served if such a determination is made at this time.

Thus, both the public interest and the interests of the litigants herein compel review at this time.

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* See, e.g., *The Conqueror*, 166 U.S. 110, 113 (1896); and *U.S. v. General Motors Corp.*, 323 U.S. 373, 377 (1945).

Conclusion

For the reasons stated in the petitions filed herein, a writ of certiorari should issue.

Respectfully submitted,

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